Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LOUIS GINBERG,
Petitioner,

v.

LASZLO N. TAUBER,
Respondent.

Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

JACOB A. STEIN
Counsel of Record
STEIN, MITCHELL & MEZINES
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

BARRY COBURN
COBURN & SCHERTLER
729 15th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-4199
Attorneys for Louis Ginberg

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the District of Columbia erred in ruling there was no Seventh Amendment right to a trial by jury of petitioner's claim for attorney's fees on the ground that it was an equitable claim in quantum meruit, where there was a factual dispute as to the existence of a fee agreement and its terms.

2. Whether the Court of Appeals erred when it extended *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1988) beyond its facts to hold that the Seventh Amendment does not mandate a trial by jury for an attorney who sues his client to recover fees, where the existence and terms of the client fee arrangement are central issues to be tried.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the District of Columbia were petitioner Louis Ginberg and respondent Laszlo N. Tauber.

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PETITION FOR WRIT OF CERTIORARI

REPORTS AND OPINIONS

The decision of the court of appeals is reported at 678 A.2d 543 (D.C. 1996).

STATEMENT OF JURISDICTION

The order of the court of appeals denying appellant's petition for rehearing or rehearing en banc was entered on August 5, 1996. The petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PROFESSIONAL RULES INVOLVED

Seventh Amendment of the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

> jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Superior Court of the District of Columbia Rule 39(a):

> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the Court or by an oral stipulation made in open court and entered in the record, consent to trial by the Court sitting without a jury or (2) the Court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or applicable law.

Rule 1.5(a) of the District of Columbia Rules of Professional Conduct:

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal services properly;
>
> (2) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the result obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) Whether the fee is fixed or contingent.

STATEMENT OF THE CASE

Petitioner Louis Ginberg (hereinafter referred to as "Mr. Ginberg") is an attorney. For a number of years, he represented Dr. Laszlo Tauber (hereinafter referred to as "Dr. Tauber"), a multi-millionaire businessman and physician, in a variety of matters. Under their usual billing arrangement, Mr. Ginberg would submit a bill to Dr. Tauber when the matter was completed. In his bill, Mr. Ginberg would not itemize the number of hours devoted to each matter, but formulated his fees principally based on the quality and value of the result obtained, as well as on the complexity of the matter, how vigorously contested it was, and the effort required to achieve the desired result.

The litigation that created the fee dispute which is the subject of this action was the lengthy and complicated case of *Laszlo N. Tauber v. District of Columbia,* C.A. No. 48-82 L&T No. 2-82, which commenced in 1979 and involved three trials, a considerable motions practice and two appeals. The case was settled in 1991, with a recovery for Dr. Tauber of approximately $21 million. Except for periodic bills for costs advanced and a single bill relating to the first appeal, Mr. Ginberg did not bill Dr. Tauber while the litigation was pending. When settlement was imminent, Mr. Ginberg discussed his forthcoming bill with Dr. Tauber, who acknowledged his understanding that the bill would be based on the quality of the result obtained. When Mr. Ginberg submitted his final bill in the amount of $3,750,000.00, based chiefly on the quality of the result, Dr. Tauber refused to pay.

On July 2, 1991, Mr. Ginberg brought a claim for money damages in the Superior Court of the District of Columbia against Dr. Tauber for $3,750,000.00 in unpaid attorney's fees which he alleged were due him pursuant to their "result-based" fee agreement. In his complaint, he requested a jury trial. Subsequently the trial court entered partial summary judgment declaring that Mr. Ginberg was entitled to a fee. Mr. Ginberg's demand, pursuant

to Superior Court Rule 39(a), for a jury trial to determine the amout of the fee was denied, and a bench trial on that issue commenced before the Honorable Robert I. Richter on July 19, 1993.[1] At trial, Dr. Tauber did not deny that Mr. Ginberg was owed a fee for his services, but Dr. Tauber vigorously disputed that there had been an agreement as to the fee arrangement. He argued that Mr. Ginberg was owed a fee tied only to the hours he had expended in his representation of Dr. Tauber. Mr. Ginberg presented evidence at trial that, although there was no written fee arrangement, his claim that Dr. Tauber had agreed to a result-based fee was predicated on (1) a long-term prior course of dealing between the parties that principally considered the quality and value of the result obtained in formulating fees, (2) correspondence dated April 26, 1984 wherein Mr. Ginberg proposed a result-based fee arrangement, and (3) Dr. Tauber's acquiescence to the result-based fee arrangement in a meeting on March 6, 1991.

On July 22, 1993, Judge Richter returned a verdict for Mr. Ginberg in the amount of $389,788.75, ruling that there was no fee agreement and the only acceptable method for calculating Mr. Ginberg's fee was by application of the equitable doctrine of *quantum meruit*. Mr. Ginberg appealed the decision to the District of Columbia Court of Appeals. After the case was briefed and argued

[1] Ginberg's request for a jury trial on the issue of the amount of the fee was denied by the Honorable Richard S. Salzman, the original judge assigned to the action, who based his denial on *Kudon v. f.m.e. Corporation*, 547 A.2d 976 (D.C. 1988). Mr. Ginberg filed no motion for reconsideration of Judge Salzman's denial, but petitioned the Court of Appeals for a writ of mandamus seeking an order to Judge Salzman to reinstate the jury demand. This petition was summarily dismissed on March 26, 1992. Subsequently, on June 8, 1993, Mr. Ginberg moved for reconsideration of the pretrial ruling striking his demand for a jury trial. The Honorable Robert I. Richter, who had received the routine reassignment of the case, denied the motion for reconsideration on the ground that the summary denial of the writ of mandamus was the law of the case.

in January, 1995, the Court of Appeals affirmed on April 25, 1996. *Ginberg v. Tauber,* 678 A.2d 543 (D.C. 1996). Mr. Ginberg's Petition for Rehearing or Rehearing En Banc was denied on August 5, 1996.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECIDED THE CASE ON A FAULTY PREMISE THAT THE EXISTENCE OF A FEE AGREEMENT WAS NOT AT ISSUE.

The Court of Appeals held that the amount of Mr. Ginberg's fees was an equitable issue and ruled accordingly that Mr. Ginberg was not entitled to a jury trial at law on the issue. The ruling of the Court of Appeals misconstrues the nature of the case. Mr. Ginberg's action is premised on the breach by Dr. Tauber of an alleged agreement to pay "result-based" legal fees. In holding there was no agreement between the parties, "formal or otherwise, concerning how the amount of fees would be determined," *Ginberg v. Tauber,* 678 A.2d at 549, the Court of Appeals disregarded the following evidence introduced at trial:

1. The lengthy course of dealings between the parties in a series of prior cases, where Mr. Ginberg virtually always billed Dr. Tauber only at the end of a case, did not itemize the number of hours devoted to the matter, and took a number of factors into consideration in setting his fees, including the quality of the result obtained for Dr. Tauber, the complexity of the matter, and the size of the transaction;
2. Correspondence dated April 26, 1984, wherein Mr. Ginberg stated that "any further fee arrangements or discussion should await [the] outcome of this appeal or to see what may eventuate. I believe this would be the only fair way in this case to have a fee determination."
3. Mr. Ginberg's testimony that, in a meeting with Dr. Tauber following a settlement conference on March 6, 1991, an agreement was reached that

> Mr. Ginberg would be paid a "result-based" fee for representing Dr. Tauber, incorporating such factors as the quality of the result obtained, the difficulty of the case, and the time expended.

Although recognizing that "the manner in which [attorneys'] fees are calculated is . . . an "at law" question if there is a dispute on that point between the parties," *Ginberg v. Tauber,* 678 A.2d at 551, the Court of Appeals refused to recognize that the manner in which the attorney's fees are to be calculated is the very issue in dispute here. Following summary judgment in Mr. Ginberg's favor on his right to be awarded fees, the trial court applied the lodestar method to compute what it considered to be reasonable attorney's fees, disregarding Mr. Ginberg's claim that the alleged agreement controlled the amount of attorneys' fees to be awarded. In affirming, the Court of Appeals assumed away the central issue in this case, incorrectly premising its opinion on the notion that this was an action to recover attorney's fees based on *quantum meruit,* not an action to recover the amount of attorney's fees pursuant to a "result-based" contract. Yet whether or not the parties agreed to a "result-based" fee—which is the central question in dispute in this case—is a factual issue which belongs to the jury. *See Simler v. Conner,* 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691, 693 (1963) (whether the parties had reached an agreement concerning the payment of fees was an "at law" dispute which should have been submitted to a jury).

In addition, the Court of Appeals ruled that a court's presumed expertise in the issue makes a fee determination "one better left to the tral court to resolve." *Ginberg v. Tauber,* 678 A.2d at 549. Mr. Ginberg argued that Rule 1.5(a) of the District of Columbia Rules of Professional Conduct sets forth the proper factors to be considered in determining the reasonableness of a fee:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal services properly;

(2) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the result obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

A jury is capable of comprehending all of these factors. By imposing the lodestar method upon the facts of this case, the trial court made a factual finding concerning the method to use to determine the appropriate fees for Mr. Ginberg. A jury may well have made a different finding as to the parties' understanding regarding what constitutes reasonable attorney's fees.

II. THE DECISION BELOW, IN EXTENDING THE RULING OF *KUDON v. f.m.e. CORP.*, 547 A.2d 976 (D.C. 1988) BEYOND ITS FACTS, IMPERMISSIBLY NARROWS AN ATTORNEY'S SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY ON THE ISSUE OF ATTORNEYS' FEES.

The dispute in this case is legal rather than equitable. As this Court observed in *Simler v. Conner*, 372 U.S. 221, 223, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963), a controversy between a client and his lawyer over the amount of fees to be paid is " 'legal' in character." *See also McGuire v. Miller*, 1 F.3d 1306, 1314 (2d Cir. 1993) ("[T]he type of breach of contract suit, by one party to a services contract against another for damages, . . . was traditionally an action at law and thus triable to a jury

under the Seventh Amendment"). By timely requesting a jury trial on the issue of the amount of his fees, Mr. Ginberg exercised his Seventh Amendment right.

Kudon v. f.m.e. Corp., 547 A.2d 976 (D.C. 1988) is not dispositive here. In holding there was no Seventh Amendment right to trial by jury on lessor's contractual right to an award of attorney's fees for defending lessee's action, the *Kudon* court essentially ruled that an award of fees pursuant to a private contract provision is not part of the substantive claim but constitutes an "equitable cleaning-up" after the underlying claim. *Kudon v. f.m.e. Corp.*, 547 A.2d at 978-80. The ruling in *Kudon* is premised upon the equitable nature of attorney's fees which are awarded to a prevailing party in an action, whether or not the fees are authorized by a private contract provision between the parties. *Kudon* has no applicability to an attorney's claim against his client to recover payment for services rendered, where the substantive issue to be tried is what the fee agreement was between attorney and client. As Chief Judge Wagner stated in her dissent below:

> It does not appear that this court had either the intention, or the occasion in *Kudon*, to reject the jury trial right for an attorney's contractual claim for fees against his client which was upheld by the Supreme Court in *Simler v. Conner*, 372 U.S. 221, 223, and upheld in this jurisdiction in *Maddox v. Jinkens*, 66 U.S. App. D.C. 362, 363-64, 88 F.2d 744, 745-46 (1936), *cert. denied*, 301 U.S. 699 (1937).

Ginberg v. Tauber, 678 A.2d at 554.

Maddox v. Jinkens, supra, is a clear statement of the right of an attorney to sue at law for the amount claimed to be due him upon a contract for his services. In *Maddox*, an attorney representing a client in an injunction suit withdrew from representation and chose to present his claim for services by motion in the ongoing suit. Although holding that the attorney's claim for services

as presented was an ancillary and summary proceeding in equity, triable to the court alone, the court observed:

> The appellant was entitled to sue at law for the amount which he claimed to be due him from Miss Jenkins upon the contract for his services and he would be entitled to try such a case to the jury.

Maddox v. Jinkens, 66 U.S. App. D.C. at 364, 88 F.2d at 746.

What was at issue in the courts below is the existence or nonexistence of an agreement that Mr. Ginberg would be paid a "reasonable fee" based largely upon the quality of the result obtained. This is a plainly factual issue, legal in nature, to which a right to a trial by jury attaches. *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 2316 at 125-26 ("An action for damages for breach of contract is legal in nature and triable to a jury"). *See also Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44, 51 (1962), where this Court held that an action for money damages for breach of a written trademark licensing agreement presented a legal claim triable by jury as a matter of right, stating, "As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character." Since Mr. Ginberg has brought an action at law to enforce his contract rights, he is entitled to try the case to the jury.

Mr. Ginberg has been prejudiced by the denial of his right to a jury trial. By denying Mr. Ginberg his Seventh Amendment right to a trial by jury when the issue is a dispute over the amount of his fees, the courts below unfairly have placed attorneys, including Mr. Ginberg, in a different category than other professionals who have a right to a jury trial when they sue for payment for services. This disparate treatment merits consideration by this Court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

JACOB A. STEIN
Counsel of Record
STEIN, MITCHELL & MEZINES
1100 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
(202) 737-7777

BARRY COBURN
COBURN & SCHERTLER
729 15th Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-4199
Attorneys for Louis Ginberg

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 93-CV-1099

LOUIS GINBERG,
Appellant,

v.

LASZLO N. TAUBER,
Appellee.

Argued Jan. 5, 1995

Decided April 25, 1996

Before WAGNER, Chief Judge, and FARRELL and KING, Associate Judges.

KING, Associate Judge:

This action arises out of a dispute over attorneys' fees between Louis Ginberg, an attorney, and his former client, Laszlo N. Tauber. Ginberg filed an action against Tauber seeking, on a quantum meruit theory, the reasonable value of the services he provided in representing Tauber in a commercial landlord and tenant dispute against the District of Columbia. Although there was no fee agreement between the parties, Ginberg maintained he was entitled to recover the sum of $3,750,000 in attorneys' fees. The claimed fee amounted to one-third of the judgment, plus accruals, recovered from the District. Disclaiming the existence of a contingency fee arrangement or any other formal contract, Ginberg argued that, based on the parties' prior course of dealing, and an oral

agreement allegedly entered into at the end of the representation, there was an "understanding" between himself and his client that his fee would be result-based. Ginberg moved for summary judgment on the issue of liability, which the court granted, and demanded a jury trial on the issue of the amount of the fee. The trial court, in a December 10, 1991 order, sua sponte, struck Ginberg's demand for a jury trial, stating:

> unless a motion for reconsideration supported by authority to the contrary is filed by . . . [Ginberg] no later than January 10, 1992, . . . [Ginberg's] demand for a jury trial shall be struck from the record on the authority of Kudon v. f.m.e. Corp., 547 A.2d 976, 980 (D.C.1988). In Kudon, the Court of Appeals held that "where a claim for attorneys' fees arises from a private contract provision, such a claim does not embody a right to a trial by jury under the Seventh Amendment." *Id.*

Ginberg filed no motion for reconsideration, but on January 13, 1992, he petitioned this court for a writ of mandamus seeking an order to the trial judge to reinstate the jury demand. We summarily dismissed the petition on March 26, 1992. On June 8, 1993, after the case was routinely reassigned to another trial judge, Ginberg's counsel moved for reconsideration of the pretrial ruling regarding his demand for a jury trial. The new judge, concluding that this court's summary denial of Ginberg's petition for a writ of mandamus should be regarded as the law of the case, denied the motion for reconsideration.

The trial court then conducted an evidentiary hearing to determine the amount of the fee, at which both parties presented fact and expert witnesses. The trial court, using the lodestar[1] method, awarded Ginberg fees in the

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[1] See *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974); *Blanchard v. Bergeron*, 489 U.S. 87, 91-93,

amount of $389,788.75, computed at a rate of $325 per hour. In this appeal from that judgment, Ginberg contends that: (1) he was entitled to a jury trial to determine the amount of the fee owed him; and (2) the trial court erred in selecting the lodestar method to determine a reasonable fee for his service.[2] We affirm.

I. Facts

Tauber owned the Presidential Building in downtown Washington D.C., which he leased to the District of Columbia (the "District") government. In October 1978, the District notified Tauber that it intended to terminate the lease and vacate the building on December 31, 1981. On December 3, 1979, however, the District attempted to rescind its termination notice. Ginberg began his representation of Tauber shortly thereafter, advising Tauber that the District was not entitled to withdraw the notice of intent to terminate the tenancy. On January 2, 1982, more than two years after the District's notice of intent to rescind the termination notice, Ginberg filed two actions on Tauber's behalf, one for possession of the Presidential Building, and one for a declaratory judgment that the District was obligated to pay a market rental, rather than the rent provided for in the lease, for as long as the District remained in possession of the property. During that two year period, Ginberg prepared the law suits, however, he never communicated with Tauber concerning the basis for the fee he intended to charge for the representation.

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109 S.Ct. 939, 943-44, 103 L.Ed.2d 67 (1989) (examining the application of Johnson); and discussion in Part III, *infra*.

[2] Tauber contends that because Ginberg did not seek reconsideration of the trial court's order denying the jury trial request, he waived his right to challenge the rejection of his jury trial demand. Tauber also contends that our denial of Ginberg's petition for writ of mandamus conclusively resolved the issue of Ginberg's entitlement to a jury trial against him. In light of our resolution of the jury trial issue, we do not consider either contention.

Tauber testified that he "very much" wanted to settle the case with the District, and he made several attempts to persuade Ginberg to seek a settlement. According to Tauber, however, Ginberg declined to initiate settlement discussions. In early 1983, the case went to trial and the District prevailed. Ginberg agreed to handle the appeal, and on April 26, 1984, wrote to Tauber about his fees for handling the appeal:

> In my discussion with you in January 1984, I informed you that in connection with the handling of the appeal I want a $5,000 payment on a fee at this time, and a like amount on account of a fee in January 1985. Actually, any further fee arrangement or discussion should await the outcome of the appeal, or to see what may eventuate. I believe this would be the only fair way to have a fee determination.

Ginberg testified that he intended the "further fee arrangement" language to take care of fees other than the appeal, but that he never communicated that understanding to Tauber. Ginberg received the requested $10,000, wrote the brief, argued the appeal, and prevailed in part, in that this court remanded the case to the trial court for a new trial. Ginberg represented Tauber in the trial following remand, and a subsequent appeal by the District and cross-appeal by Tauber, from a $6.6 million verdict in Tauber's favor. By early 1991, the judgment and post-judgment accruals of rent, damages, and interest totaled $11,250,000. During this time, Ginberg refused to initiate settlement discussions with the District, despite Tauber's urging, and threatened to withdraw from representing Tauber if Tauber tried to initiate a settlement himself or through anyone else. Nonetheless, Tauber settled the case for $9 million in amortized payments over the balance of the lease, with eight and three-quarters percent interest per annum.

Ginberg also testified that the parties' first fee discussion for the entire representation occurred outside the

Corporation Counsel office following the settlement conference. According to Ginberg, he informed Tauber that he believed he was entitled to a fee of thirty percent of the settlement amount, to which Tauber responded "fine." Tauber remembered the conversation differently. He testified:

> [Ginberg] said to me that he discussed with certain colleagues of his and they suggested a 40 percent of the savings on the award, and I was in shock. I looked at him and just couldn't answer to him. And he repeat it again that I am asking only one-third. And he—I was still in shock, because nothing in the world that I expected this one. And I told him don't explain to me the contingency fee, I am a practicing physician and I know what malpractice cases is and the lawyers are charging one-third of the claim. But this wasn't a malpractice case, but Mr. Ginberg, I am not discussing fees in the lobby. [sic]

Following that conversation, Ginberg sent Tauber a bill for $3,750,000, exactly one-third of the amount of the judgment plus accruals. The requested fee was approximately forty percent of the settlement amount. This triggered a contentious correspondence between the parties, leading to the present action.

In the ten years that Ginberg represented Tauber in the District/Tauber rental dispute, Ginberg kept no record of the time he expended on Tauber's behalf, and did not communicate with Tauber about his fees, except the $10,000 for the appeal. Ginberg testified that he was unaware of his professional responsibility to make the terms of his fee clear to the client at the beginning of the representation. He further testified that his fee was based on the benefits to, or the amout Tauber realized from the litigation, the problems he encountered during the trial, and the ten-year duration of the representation.

Ginberg testified that he was entitled to charge Tauber a fee regardless of the outcome of the litigation, and rep-

resented that the post-settlement fee conversation between himself and Tauber was not an agreed basis for his recovery. Specifically, Ginberg made clear in the trial court that he was not contending that Tauber had agreed to pay a percentage of recovery as Ginberg's fee during that conversation. Ginberg maintains, instead, that he was entitled to a quantum meruit recovery for the "reasonable value" of his services, and the result-based bill submitted in support of this claim is consistent with the method used in his prior representations of Tauber from 1971 through 1979.

With respect to those prior representations, the evidence showed that Ginberg billed Tauber in five other real estate transactions involving the purchase of "multi-million dollar" real properties for which Ginberg billed between $1,000 to $23,000 in fees. Ginberg testified that during these transactions, he never disclosed to Tauber the basis of the fees he billed, and Tauber paid because Tauber trusted him to send an accurate bill. Ginberg represented Tauber in two other cases on a contingency fee basis: (1) an action against Traveler's Insurance Company, for which he billed Westwood Management Company, the corporation employed by Tauber to manage his real estate holdings; and (2) a claim against an architect. However, Ginberg could not recall the fee arrangement in the architect matter. Finally, after he began the representation of Tauber in this action, Ginberg submitted two bills to Tauber in connection with another case, the "Savoy litigation"; $15,000 in the middle of the litigation and $45,000 at the end. The Savoy litigation involved a series of arbitration proceedings and litigation of complex legal and factual issues over a period of five years, which resulted in approximately $2 million in benefits to Tauber. Ginberg believed the fee in that case, like all other fees he had billed Tauber, was "quite reasonable," but he testified that he had no agreement or understanding of any kind with Tauber about the basis of the fee. Tauber testified that although none of the attorney's fee

bills he had previously received from Ginberg stated the number of hours Ginberg had spent on the matter at issue, he trusted Ginberg, and never had any reason to question the amount of the fee.

Ginberg presented the expert testimony of two trial attorneys, each of whom opined the $3,150,000 fee was reasonable. Charles Donnenfeld, who was a practicing lawyer and Chairman of the District of Columbia Board on Professional Responsibility, testified that in his opinion, the fee was reasonable under the criteria set forth in the disciplinary rules. He based his opinion on the assumption that both parties focused on the result obtained in the litigation, and the length of the litigation (ten years). He did not review any of the motions, pleadings, briefs, judges' opinions, or other documents associated with the litigation.

The other witness, George Shadoan, also opined that the reasonable value of Ginberg's services was thirty percent of the benefits resulting from those services. He testified that a number of relevant decisions recognize a range of reasonableness of between twenty-five percent and forty percent of the net recovery. Shadoan acknowledged, however, that the "relevant decisions" to which he referred were all "common fund" cases in which the lawyers were not entitled to a fee unless they prevailed on behalf of the client in establishing a common fund.[3] Although Shadoan did not believe a lodestar computation was an appropriate basis for determining the fee in this case, he testified that, even using that method, the requested fee was reasonable. His opinion was based on Ginberg's claim that he devoted substantially all his working time over a ten-year period to Tauber's action against the District. Accepting that assertion as fact, Shadoan

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[3] See, e.g., *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 415 n.57, 641 F.2d 880, 905 n.57 (1980); *Passtou, Inc. v. Spring Valley Ctr.*, 501 A.2d 8, 10 (D.C.1985); *District of Columbia v. Green*, 381 A.2d 578, 580 (D.C.1977).

opined that Ginberg would have spent approximately 12,000 hours, which at $280[4] an hour would yield a $3,360,000 fee.

Tauber presented two expert witnesess, Daniel Rezneck and Joseph Yablonski, each of whom estimated the reasonableness of the fee based on a review of Ginberg's time logs and diaries, the pleadings and papers in the litigation, the correspondence, files, and discovery materials. Both experts concluded that Mr. Ginberg expended approximately 1400 hours on the case and should be compensated between $285 and $325 per hour. The court accepted the higher of the two estimated rates as being most reasonable, and based on that rate, awarded Ginberg $389,788.75 in fees.[5] The court held that no "value addition" should be included because: (1) the $325 an hour fee was one at which "it is expected that excellent legal work will be done"; (2) the result, while beneficial to Tauber, was neither "as lucrative as it could have been," nor principally the result of Ginberg's legal services; (3) absent some agreement to the contrary, the notion that an attorney has an interest in the leasehold as a result of his legal work, is neither fair or reasonable. Finally, the court held that the case could not have gone to the jury because

> on this record, it's inconveivable a jury would have had the option to find any sort of contingency or value-based fee.
>
> And the only evidence really here of the quantum meruit value is what was presented by the defense, so it's hard to see how a jury would have—could possibly have resulted in any more favorable verdict for the plaintiff in this case.

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[4] In Shadoan's opinion this amount was a reasonable hourly rate for an attorney with Ginberg's experience and skill.

[5] This amount was determined by multiplying $325 by 1411 hours, less a fifteen percent downward adjustment for the routine performance of non-attorney 'ministerial' duties."

> isted in 1791," *Curtis v. Loether,* 415 U.S. 189, 193, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260 (1974), the guarantees afforded have been interpreted to encompass ". . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . ." *Id.* (quoting *Parsons v. Bedford,* 28 U.S.C. (3 Pet.) 433, 446-47, 7 L.Ed. 732 (1830)).

Kudon, supra, 547 A.2d at 978. Additionally, we observed that the right to a jury trial depends on the nature of the question at issue rather than the character of the overall action. *Id.* (citing *Ross v. Bernhard,* 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970)). Where the disputed issue is legal in nature, the right to a jury trial attaches; where, however, the issue is equitable in nature, there is no constitutional right to a jury trial. See *Ross, supra,* 396 U.S. at 538, 90 S.Ct. at 738.

In analyzing whether the controversy was "at law" or "in equity," the *Kudon* court applied the three factors the Supreme Court has said should be considered in determining whether an action is legal or equitable in nature: (1) the custom before the merger of law and equity; (2) the nature of the remedy being sought; and (3) the practical abilities and limitations of juries. *Kudon, supra,* 547 A.2d at 978 (citing *Ross, supra,* 396 U.S. at 538, 90 S.Ct. at 738).

First, the court concluded that an examination of the pre-merger custom indicated that traditionally, the court, not the jury, made a determination of attorneys' fees and costs. *Id.* at 979 (citing *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.,* 553 F.Supp. 118, 123 (N.D.Ill.1982); *Redshaw Credit Corp. v. Diamond,* 686 F.Supp. 674 (E.D. Tenn. 1988)). Second, "the fact that a claim for attorneys' fees can be characterized as one

The trial court then entered judgment for $389,788.75. This appeal followed.

II. Jury trial demand

This case presents an issue of first impression in this court, and no other jurisdiction, so far as we know, has dealt with this issue in precisely this context; i.e., whether an attorney who has no agreement with his client concerning the amount of the fee to be paid, who sues the client to recover fees under a quantum meruit theory, is entitled to a jury trial. We hold that where it is undisputed that the client owes the attorney some fee for his legal representation, but there is no agreement concerning how the amount will be determined and the attorney has not informed the client of the basis of his fee, the trial court, not the jury, determines the amount of fee to be paid.

In rejecting Ginberg's jury demand, the trial court relied on this court's holding in *Kudon, supra,* 547 A.2d at 980. In *Kudon,* the lessee of postal meters sued the lessor alleging tortious interference with contractual relations with the United States Postal Service. Summary judgment was entered in favor of the lessor who then sought an award of attorneys' fees pursuant to the lease agreement. The lessee's request for a jury trial on that issue was denied, the trial court determined the amount of the fee to be awarded, and the lessee appealed.

In affirming the trial court's rejection of the jury trial demand in *Kudon,* we reviewed the origin and development of the Seventh Amendment right to a jury trial, relying on an "at law" and "in equity" distinction. We observed that the Seventh Amendment guaranteed the right to trial by jury in suits at common law, where the value in controversy exceeds twenty dollars:

> [w]hile historically the [Seventh] [A]mendment was intended "to preserve the right to jury trial as it ex-

for monetary damages does not compel its classification as a legal remedy" *Id.* (citations omitted). Third, given the court's "presumed expertise . . . in matters of attorney fees, . . . [t]he time and expense which would be required to educate lay jurors on those matters about which the court is presumed an expert and [ ] the unacceptable expense and delay of bifurcating trials in order to separate issues of liability from lawyer skills and preparedness, . . . we believe that the question of what constitutes a reasonable attorneys' fee . . . is one better left for the court." *Id.* (internal citations omitted) (emphasis added); see also *Redshaw, supra,* 686 F.Supp. at 677 (although not totally incapable of jury determination, it is better for the court to determine what comprises a reasonable attorneys' fee).

In this case there is no "at law" factual dispute. Tauber agrees that he owes Ginberg a fee, and Ginberg concedes there was no agreement, formal or otherwise, concerning how the amount of fees would be determined.[6] In short, all that remained to be determined at trial was the amount of the fee. And, as we said in *Kudon,* that determination is one which sounds in equity rather than law. See *Kudon, supra,* 547 A.2d at 979. Therefore, we conclude, as the trial court did, that under *Kudon* the attorney fee dispute

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[6] Our dissenting colleague, quoting Ginberg's testimony concerning his conversation with Tauber at the conclusion of the representation, concludes that Tauber is said to have agreed to a result-based fee and whether or not he did so is an issue "legal" in character entitling him to a jury trial. As we have observed, however, Ginberg did not contend that during the course of that conversation Tauber agreed to pay a specific fee based upon a percentage of the recovery. There is no doubt that Tauber acknowledges that Ginberg is entitled to recover a reasonable fee, but there is nothing in the record relating to any agreement as to the amount that fee would be. Therefore, as we have stated in the text, the only question to be determined, under these circumstances is: What is a reasonable fee? And, as we have said, that is a determination for the court to make, not a jury.

in this case is one that is better left for the court to decide, not the jury. *Id.*

Ginberg challenges the reliance on *Kudon* on three grounds: (1) the post-judgment award of attorneys' fees to a litigant who prevailed on the merits in *Kudon* was essentially an equitable "cleaning-up" of the underlying claim; (2) *Kudon*'s holding is tied to the facts of that case, and therefore, distinguishable from this case; and (3) *Kudon* is not a general declaration of principle that the Seventh Amendment right to a jury trial is unavailable where the claim for attorneys' fees is the issue itself, rather than ancillary to the underlying dispute, to be determined after resolution of the substantive issues. We disagree.

In *Kudon,* the court's analysis focused on defining the circumstances where the right to a jury trial under the Seventh Amendment attaches. Central to that holding was the conclusion that the Seventh Amendment guarantee of a right to a jury trial does not apply where the issue is: What is a reasonable attorneys' fee? *Id.* at 978-79. That conclusion is not dependent upon the fee claim being ancillary to the underlying contract dispute. Therefore, we see no basis for limiting the holding in *Kudon* to attorney fee determinations that are closely related or intertwined with some other dispute.

Ginberg also contends that *Maddox v. Jinkens,* 66 U.S. App. D.C. 362, 88 F.2d 744 (1936), cert. denied, 301 U.S. 699, 57 S.Ct. 929, 81 L.Ed.1354 (1937), *Simler v. Conner,* 372 U.S. 221, 223, 83 S.Ct. 609, 611, 9 L.Ed.2d 691 (1963), and cases addressing the issue of attorneys' fees in the divorce [7] and common fund [8] con-

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[7] *King v. King,* 579 A.2d 659 (D.C. 1990) (court asked to enforce attorneys' fee provision in separation agreement).

[8] *McCally v. Hartford Accident & Indem. Co.,* 247 F.Supp. 444 (D.D.C. 1965); *Moschetta v. Cross,* 241 F.Supp. 347 (D.D.C. 1964); *First Nat'l Bank of Boston v. Brink,* 372 Mass. 257, 361 N.E.2d 406 (1977).

text, require us to hold that this attorney fee dispute sounds "in law" rather than "in equity." The cases relied upon by Ginberg, however, are distinguishable because each involved the resolution of what were clearly "at law" disputes based on a contractual agreement for attorneys' fees where there were unresolved issues of fact. See, e.g., *Maddox, supra,* 66 U.S. App. D.C. at 364, 88 F.2d at 746; *Simler, supra,* 372 U.S. at 223, 83 S.Ct. at 611. The issue in those cases, which is a classic "at law" determination, was whether the parties had reached agreement concerning the payment of fees, i.e., was there a contract requiring the payment of a fee to the attorney? In this case, however, there was no dispute that the attorney was owed a fee and there was no dispute that the parties had reached no agreement concerning how the amount of the fee would be determined. The only issue in this case was what was a reasonbale fee under the circumstances.

In *Maddox,* an attorney sued his client claiming she had agreed to pay him a retainer of $150, plus additional fees at specified rates. The attorney claimed he had performed $350 of additional services at those rates. The client ackowledged she was obligated to pay the $150 retainer, but denied that she had agreed to pay the additional amounts. Thus, a clear "at law" factual dispute was presented: did the client agree to pay the additional sums? The matter was referred to a master who found for the client, and the trial court affirmed that finding. The court of appeals also affirmed, on grounds not relevant here, but observed, in dictum, in language that Ginberg relies upon, that the attorney "was entitled to sue at law for the amount he claimed to be due him . . . upon the contract for his services and he would be entitled to try such a case to the jury." *Maddox, supra,* 66 U.S. App. D.C. at 364, 88 F.2d at 746.

Even assuming that the *Maddox* dictum controls, it stands for the proposition that, in resolving factual issues

regarding the existence of a contract, the parties are entitled to a jury trial. See *id.* Thus, the dispute in *Maddox* was like thousands of other garden-variety contract disputes where the intent of the parties must be determined by the fact-finder in an "at law" proceeding. See, e.g., *Rivers & Bryan, Inc. v. HBE Corp.*, 628 A.2d 631, 635 (D.C. 1993); *Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chem. Corp.*, 684 F.2d 776, 780 (11th Cir. 1982). Unlike the parties in *Maddox*, however, who disagreed concerning the nature of the agreement between them, Ginberg concedes there was no agreement; thus, there is nothing for a jury to resolve. The only question remaining is the amount of Ginberg's fee, and as we observed earlier, that determination is one better left to the trial court to resolve. *Kudon, supra*, 547 A.2d at 979; see also *Redshaw, supra*, 686 F.Supp. at 677.

We also reject Ginberg's reliance on *Simler* for much the same reason. The issue there was which of the two fee retainer contracts between the parties should govern the determination of the amount of the fee to which the attorney was entitled. *Simler, supra*, 372 U.S. at 223, 83 S.Ct. at 611. The client relied on the contract that was first executed, which provided that the reasonableness of the fee was to be set by the trial court. On the other hand, the attorney relied on a subsequent contract specifying that he was entitled to receive fifty percent of the recovery, under certain circumstances, as his fee. The Supreme Court held that plaintiff was entitled to a jury trial because the dispute was a traditionally legal one and not an action in equity. *Id.* The actual amount of the fee to be paid was specified by the two contracts involved, and the only question to be resolved was which contract applied. That question turned on whether the attorney obtained the client's agreement to the second contract by duress. The determination of whether agreement to a contract was induced by duress is a traditional "at law" factual question for a jury to decide. *Sind v. Pollin*, 356

A.2d 653, 656 (D.C. 1976). Thus, *Simler* does no more than hold that when there is a factual dispute concerning which attorneys' fee contract applies to a transaction, a party is entitled to have a jury resolve that "at law" factual question. See *Simler, supra,* 372 U.S. at 223, 83 S.Ct. at 611.

Finally, *Redshaw, supra,* 686 F.Supp. at 674, a case cited with approval by the *Kudon* court, is especially instructive. Redshaw received a favorable verdict in a contract action after a trial by jury and thereafter sought an award of attorneys' fees from the court pursuant to a provision in the same contract that the jury had found should be enforced in Redshaw's favor. The defense contended that, to obtain an award of attorneys' fees, Redshaw was obligated to present evidence to the jury concerning the amount of the fee expended, which Redshaw had failed to do. The court rejected that claim, noting the jury had performed its function by resolving the facts in the legal dispute between the parties. *Id.* at 676-77. In doing so, the jury, in effect, also resolved, in Redshaw's favor, the threshold question of whether Redshaw was entitled to receive attorneys' fees. The court then ruled that the determination of the amount of fees was for the court to make. *Id.* The *Redshaw* court thus concluded, as we have, that the question of whether the contract provides for the payment of a fee is an "at law" determination, which a party is entitled to have a jury resolve if there are facts in dispute. But the determination of the amount of the fee, unless the amount is fixed by the contract, is one for the court to determine.

In sum, for the reasons stated, we hold: first, the question of whether the client has agreed to pay fees to the attorney for his or her services is ordinarily a question to be resolved "at law"; and, the manner in which such fees are calculated is also an "at law" question if there is a dispute on that point between the parties. The parties are entitled to have both questions resolved by a jury if

they wish.[9] Second, if a jury has resolved those questions in favor of an attorneys' fee award, or if, as here, there is no agreement concerning how the amount of fees is to be calculated, the trial court, acting "in equity," determines the amount of the fee. Thus, in this case, the trial court did not err when it denied Ginberg's request for a jury trial.

III. Lodestar fee calculation

Ginberg contends that the reasonable value of his services is 40 percent of the result obtained. He maintains the trial court erred in applying the lodestar method to determine reasonableness, arguing that an application of the factors in Rule 1.5 of the DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT would more accurately determine the true value of his services. We disagree for two reasons. First, the Rule 1.5 factors[10] are almost iden-

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[9] In stating this, of course, we mean to cast no doubt upon the validity of D.C. Bar R. XIII, which provides in part that "[a]n attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client. . . ." See *Kelley Drye & Warren v. Murray Indus.*, 623 F.Supp. 522, 525, 527 (D.N.J. 1985) (by voluntarily subjecting itself to the disciplinary jurisdiction of state Supreme Court, law firm has relinquished its Seventh Amendment right to jury trial in favor of arbitration where client elects latter under state Bar rule).

[10] Rule 1.5(a) factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skills requisite to perform the legal services properly;

(2) The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the result obtained;

tical to the factors that are used in the lodestar method of fee calculation,[11] see *Johnson, supra,* 488 F.2d at 717-19, and the trial court properly applied those factors. See *Frazier v. Franklin Inv. Co.,* 468 A.2d 1338, 1341 n. 2 (D.C. 1983) (the Johnson factors are applicable to the assessment of attorneys' fees in general). Thus, Ginberg's contention that the court erred as a matter of law in applying the lodestar method is without merit.

Second, we find it ironic that Ginberg relies on Rule 1.5 in light of his own failure to abide by other provisions of the same rule that require an attorney to "communicate to the client, in writing, the basis or rate of the

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(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT, Rule 1.5.

[11] The Johnson factors are:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal services properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

Johnson, supra, 488 F.2d at 717-19.

fee, before or within a reasonable time after commencing the representation." DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1985). Because Ginberg kept very few records, the trial court had virtually no guidance in its effort in determining a reasonable fee. For example, as we summarized above, Ginberg had no fee agreement with the client, kept no record of the work performed for the client for over ten years, and sent no interim bills to the client. Even Ginberg's "course of dealing" with his client provided no guidance in determining a reasonable fee for the Tauber litigation.

The trial court had two choices in determining Ginberg's fee: apply an hourly rate based on lodestar, or award Ginberg a fee based on the result of the litigation. A trial court, however, should be wary of awarding a result-based fee unless the attorney seeking such a fee has obtained the client's agreement to that arrangement at the beginning of the representation. See *Spilker v. Hankin*, 88 U.S. App. D.C. 206, 210, 188 F.2d 35, 39 (1951) (fee contracts entered into long after the attorney-client relationship commenced are always subject to "the close scrutiny of the court, . . . [and often are] attended by a presumption of invalidity and overreaching"); see also *Pete v. United Mine Workers of Am. Welfare & Retirement Fund of 1950*, 171 U.S. App. D.C. 1, 17, 517 F.2d 1275, 1291 (1975) (en banc) (citing *Spilker* and invalidating one-third contingency fee agreements with class members solicited after judgment for liability). Thus, because "clients are wards of the court in regard to their relationship with their attorneys," *Spilker, supra*, 88 U.S. App. D.C. at 208-09, 188 F.2d at 37-38, the trial judge properly determined the attorney fee using the lodestar method.[12] *Frazier, supra*, 468 A.2d at 1341 (lodestar

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[12] In applying the Johnson factors, the court determines the reasonable number of hours and the attorney's hourly rate. These figures are multiplied together to produce the "lodestar," or the reasonable value of the fees. See *Johnson, supra*, 488 F.2d at 719.

generally used to calculate reasonable attorneys' fees); see also *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (there is a strong presumption that the lodestar figure represents a reasonable fee); *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 1544, 79 L.Ed.2d 891 (1984) (same). Therefore, we will not disturb the trial court's selection of the lodestar method, because "in the absence of anything more concrete, the benefit has to be given to the client." *Frazier, supra*, 468 A.2d at 1341 (trial court's fee determination will stand absent abuse of discretion).

Based on the expert testimony presented and an independent determination by the trial court of the service provided by Ginberg, the trial court found that Ginberg expended a total of 1411 hours on the case at a rate of $325 an hour. After making the adjustment discussed above, the court awarded Ginberg $389,788.75 in fees.[18] Because that fee award is adequately supported by the trial court's reasoning, and the factual record, see *id.* (we will not disturb judgment where trial court articulates reasons for fee award), the judgment of the trial court is, Affirmed.

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[18] See *supra* note 5.

WAGNER, Chief Judge, dissenting:

In my view, the trial court erred in denying appellant the jury trial guaranteed him by the Seventh Amendment of the Constitution.[1] The pleadings and the record show that appellant's claim involved, not merely equitable rights and remedies, but claims legal in character. Specifically, appellant claimed that appellee had agreed to a result-based fee which depended upon the result obtained rather than being related solely to the hours expended in rendering the services. He contended that his claim that there was such an agreement was supported by a long-term prior course of dealing with appellee, which considered the quality of the result obtained, related correspondence, and appellee's assent to the arrangement in this case.[2]

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[1] The Seventh Amendment provides that:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Amendment is "fullly applicable to courts established by Congress in the District of Columbia." *E.R.B. v. J.H.F.*, 496 A.2d 607, 610 n. 6 (D.C. 1985)

[2] Appellant testified concerning the claimed agreement as follows:

> Q. Tell us what you said and Dr. Tauber said?
>
> A. Dr. Tauber had asked one of his employees to get his, Dr. Tauber's car. And while we were waiting for the car to come around, pick up Dr. Tauber, I said, "Doctor, there hasn't been a day that's gone past that I haven't worked or thought about this case. And I think this would be a good time, if we can, to settle the question of my fee." Shall I continue on?
>
> Q. Yes?
>
> A. And I said to him, "What I'm willing to do at this point, at this time of my life, is to use the settlement figure as a guideline to settle the case—to settle the matter of my fee.["] And as I recall I said, "We will take the amount that I have recovered or been successful in obtaining for you at this point."

At trial, appellant offered expert testimony to establish a reasonable result-based fee for his services. Having denied appellant a jury trial, the trial court sitting without a jury, resolved the factual dispute as to whether the parties had a value-based agreement against appellant.

Such issues as whether there was an agreement, and the terms of the agreement are "legal" in character, and can, and should be submitted to a jury. *Simler v. Conner*, 372 U.S. 221, 223, 83 S.Ct. 609, 611, 9 L.Ed.2d 691 (1963) (suit to determine amount of fees owed to lawyer by client under a contingent fee agreement is "legal" action subject to jury trial);[3] see also *Maddox v. Jinkens*, 66 App. D.C. 362, 363-64, 88 F.2d 744, 745-46 (attorney is entitled to sue at law upon claimed agreement for fee), cert. denied, 301 U.S. 699, 57 S.Ct. 929, 81 L.Ed. 1354 (1937). "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970). Thus, where the issue in dispute is legal in nature, a constitutional right to trial by jury attaches. *E.R.B.*, *supra* note 1, 496 A.2d at 611. The majority,

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That was the dollar amount. And I would take 30 percent of that amount to—as compensation for my services.

I said, "You will benefit for receiving a higher rental rate under the lease from here on in. And I will make no claim to that. You will get the benefit of that without any charge of claim by me on that. And I, as I say, just the percentage on what I have gotten for you to this point." And I said, "How does that sound to you?" And his answer was, "Fine." He says lawyers usually take or charge a third, I don't remember what verb he used, but that was the gist of it. He was satisfied.

[3] In *Simler*, the respondent challenged the contingent fee contract as "the product of fraud and overreaching by the lawyer." 372 U.S. at 223, 83 S.Ct. at 611. Nevertheless, the Supreme Court held that "[t]he question[ ] involved . . . traditional common-law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested." *Id.*

apparently agreeing with these principles, acknowledges that an attorney has the right to have a jury determine (1) whether the client has agreed to pay attorney fees and (2) "the manner in which such fees are calculated." [4] These are the very issues which appellant sought to have a jury determine in this case. Under the principles set forth in *Simler* and *Maddox,* appellant was entitled to the jury trial for which he made a timely demand.

This court's opinion in *Kudon v. f.m.e. Corp.,* 547 A.2d 976 (D.C. 1988), upon which the trial court and the majority rely here, does not dictate otherwise. *Kudon* involved a suit for breach of contract in which the prevailing party sought an award of reasonable attorney's fees pursuant to a provision in the contract sued upon which provided for same. 547 A.2d at 977. Under such circumstances, the award of attorney's fees is incident to the main claim, and viewed as more restitutional in nature, and thus as an equitable claim. *Id.* at 979 (citing *A.G. Becker-Kipnis & Co. v. Letterman Commodities,* 553 F.Supp. 118, 124 (N.D. Ill. 1982)); see also *Cheek v. McGowan Elec. Supply Co.,* 511 So.2d 977, 979 (Fla. 1987) (contractual provision authorizing attorney's fees is not part of the substantive claim because only intended to make the successful party whole). Relying on these and other cases, this court in *Kudon* determined that the request for attorney's fees in this contractual fee-shifting case was "more in the nature of an equitable, rather than a legal, remedy." *Kudon,* 547 A.2d at 979. Therefore, consistent with the rule that no constitutional right to a jury trial attaches when the issue is equiable in nature, see *E.R.B., supra* note 1, 496 A.2d at 611, this court rejected the assertion of the right to a jury trial upon the issue. It does not appear that this court had either the intention, or the occasion in *Kudon,* to reject the jury trial right for an attorney's contractual claim for fees

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[4] See majority opinion at 551.

against his client which was upheld by the Supreme Court in *Simler, supra,* 372 U.S. at 223, 83 S.Ct. at 611, and upheld in this jurisdiction in *Maddox, supra,* 66 App. D.C. 362, 363-64, 88 F.2d at 745-46. For these reasons, I respectfully dissent from the opinion of the court.

APPENDIX B

[Filed Aug. 5, 1996]

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 93-CV-1099
CA8437-91

LOUIS GINBERG,
Appellant,

v.

LASZLO N. TAUBER,
Appellee.

BEFORE: * Wagner, Chief Judge; Ferren, Terry, Steadman, Schwelb, * Farrell, * King, Ruiz, and Reid, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division * that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Chief Judge Wagner would grant rehearing.

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

No. 96-711

In The

Supreme Court of the United States

October Term, 1996

LOUIS GINBERG,

Petitioner,

v.

LASZLO N. TAUBER,

Respondent.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF IN OPPOSITION

WILLIAM DANIEL SULLIVAN
Counsel of Record
COLLIER, SHANNON, RILL
& SCOTT, PLLC
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
(202) 342-8558

NEAL GOLDFARB
INGERSOLL AND BLOCH
1401 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-9699

Attorneys for Laszlo N. Tauber

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

In the opinion of counsel for Respondent, the following questions would be presented by the record and decisions in this case if this Court were to grant review:

1. Whether Petitioner preserved his claim to a jury trial when he deliberately refused the trial court's request to explain, in light of prior decisions by the District of Columbia Court of Appeals, why he was entitled to a jury trial.

2. Whether the District of Columbia Court of Appeals erred in its determination that Petitioner had based his claim for recovery on quantum meruit rather than on any agreement with Respondent regarding the fee or the basis for determining a fee.

3. Whether Petitioner could have been harmed by any constitutional error where (a) the fee awarded was the highest fee which could have been awarded upon the evidence and the local-law standard for award of attorneys' fees and (b) any vacation of that award would result in mandated arbitration rather than trial by jury.

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STATEMENT OF THE CASE

Two significant facts are omitted from the statement of the case by Mr. Ginberg. *First*, the case below was commenced, pretried, tried, argued and decided on factual and legal theories completely different from those asserted in the petition. *Second*, Mr. Ginberg's jury demand was struck not because of any theoretical legal rationale but because Mr. Ginberg deliberately refused to follow an order of the trial court to brief his position that he was entitled to trial by jury.

In his complaint against Dr. Tauber, filed in the Superior Court of the District of Columbia, Mr. Ginberg asserted a claim for a fee for having represented Dr. Tauber in that court (and on appeal to the District of Columbia Court of Appeals). The fee claimed by Mr. Ginberg was $3,750,000 – exactly one-third of the value of the judgment obtained by Mr. Ginberg in representing Dr. Tauber (and about 40% of the amount for which Dr. Tauber settled the judgment). (Pet. App. 4, 5.)

The complaint was expressly premised upon an oral hiring of Mr. Ginberg by Dr. Tauber to provide legal services and, therefore, the obligation of Dr. Tauber to pay "the fair and reasonable value of plaintiff's services." There was no claim that the parties had ever agreed upon a value for those services or upon a basis for determining their value.[1]

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[1] In the alternative, Mr. Ginberg's complaint asked for a one-third contingency fee. At trial, however, he specifically testified that he was "*not* claiming a contingency fee in this case" (Trial Tr. 210, emphasis added) and represented that "he

Thereafter, Mr. Ginberg successfully resisted discovery of fees he had charged in other cases by contending that the fee due him was to be determined not by reference to any standard fees or hourly rates he may have charged to others but, rather, on the principles of quantum meruit. (R. 87-88.) Under District of Columbia law, the principles of quantum meruit apply only to an obligation implied in law in the absence of agreement. *Chase v. Gilbert*, 499 A.2d 1203, 1207 (D.C. 1985).

At the conclusion of discovery, in their joint pretrial statement, the parties stipulated to the disputed issue, "What is a reasonable fee for Plaintiff's services in the litigation against the District of Columbia?" The parties also stated their disagreement about the applicable basis for determining what constituted a "reasonable fee." Mr. Ginberg contended that the reasonableness of his claimed fee should be determined under Rule 1.5(a) of the District of Columbia Rules of Professional Conduct; *i.e.*, that the issue to be tried was whether the fee which Mr. Ginberg asserted was reasonable. Dr. Tauber asserted that a reasonable fee in this matter should be determined "from the ground up" through the use of the "lodestar" method.

Since both parties agreed that some fee was due, the trial court entered a partial summary judgment for Mr. Ginberg (on liability), with the amount of the fee to be determined by trial. It was at this stage, as Mr. Ginberg correctly recites in his petition, that the trial court denied his demand for a jury trial. Mr. Ginberg neglects to

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was *not* contending Tauber had agreed to pay a percentage of recovery. . . . " (Pet. App. 6, emphasis added; *see* Trial Tr. 22.)

explain why that happened, however. The trial court, *sua sponte* and on the basis of precedent in that court,[2] issued an order on December 10, 1991, that

> *unless* a motion for reconsideration supported by authority to the contrary is filed by [Ginberg] no later than January 10, 1992, [Ginberg's] demand for a jury trial *shall be* struck from the record. . . . [Pet. App. 2, emphasis added.]

Mr. Ginberg deliberately (a "tactical decision" as he later described it) filed nothing, and his demand was struck.

After the thirty-day deadline imposed by the trial court, Mr. Ginberg filed (and briefed) a petition for writ of mandamus in the court of appeals, asking that his jury demand be reinstated. That court denied the petition. (Pet. App. 2.)

More than a year later, Mr. Ginberg (by then represented by new counsel) moved for reconsideration of the order striking his jury demand. (*Id.*) The trial court held that Mr. Ginberg had waived any right to jury trial by failing to follow the briefing requirement of the prior order and that the denial of the writ of mandamus was the law of the case.[3]

At trial, Mr. Ginberg admitted that, during the more than two years he took to prepare to file his complaint against the District of Columbia on behalf of Dr. Tauber,

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[2] *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1988) (claim for attorneys' fees under contractual fee-shifting provision not subject to trial by jury).

[3] The court of appeals declined to decide the correctness of either ground of decision by the trial court. (Pet. App. 3, n.2.)

he never communicated with Dr. Tauber about the basis for the fee he would charge in the representation. (Pet. App. 3.) He also admitted that he never communicated to Dr. Tauber his subjective understanding of how he expected to be compensated for the representation. (*Id.* at 5.) Indeed, he expressly testified that he was unaware of his professional responsibility to make the terms of his fee clear to his client at the beginning of his representation. (*Id.*)

Mr. Ginberg gave evidence at trial of other dealings with Dr. Tauber involving "multi-million dollar" real estate transactions and multi-year litigations involving millions of dollars for which, at the end of the representation, Mr. Ginberg had charged fees ranging from $1,000 to $60,000. (*Id.* at 6.) Both the trial court and the court of appeals held that this "course of dealing" "provided no guidance in determining a reasonable fee for the [instant] litigation." (*Id.* at 8, 18.) Mr. Ginberg also testified that, after the litigation had been concluded and settled, Dr. Tauber responded "fine" to a suggestion that Mr. Ginberg would charge Dr. Tauber a result-based fee for his services. (Pet. App. 4-5, 11 n.6.) Mr. Ginberg, however, specifically eschewed reliance upon that conversation as the basis for any fee agreement.[4]

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[4] Responding to an inquiry by the trial court during closing argument, counsel for Mr. Ginberg acknowledged: "I don't think it [the conversation] has all that much significance. I think even though Dr. Tauber said I agree to pay you a third [sic], he is not bound by that." (Trial Tr. 571.) Under the law of the District of Columbia governing post-representation agreements, Mr. Ginberg had no choice in the matter. *See Spilker v. Hankin*, 88 U.S. App. D.C. 206, 210, 188 F.2d 35, 39 (1951) (fee agreements

At the conclusion of the evidence, the trial court held that the case could not have gone to the jury because

> the only evidence really here of the quantum meruit value is what was presented by the defense, so it's hard to see how a jury could have – could possibly have resulted in any more favorable verdict for the plaintiff in this case. [Pet. App. 8.]

The court of appeals read the record of the proceedings both in the trial court and on appeal as one in which "Ginberg maintains . . . that he was entitled to a quantum meruit recovery for the 'reasonable value' of his services . . . " (Pet. App. 6), a record which demonstrated beyond any question that Ginberg had no fee agreement with his client and had failed in his professional responsibility to communicate to his client the basis of the fee to be charged. (*Id.* at 17-18.)

The court of appeals affirmed the decision of the trial court, holding that an attorney is not entitled to a jury trial upon the amount of his fee where, as in this case, there was neither any agreement between the parties as to how the fee would be determined nor any compliance by the attorney with his professional obligation to have made clear to the client the basis for his fee at the outset of the representation. (*Id.* at 10.) The court of appeals also held that the proper method for determining a reasonable

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entered into long after commencement of attorney-client relationship are "attended by a presumption of invalidity and overreaching"); *Pete v. United Mine Workers of Am. Welfare & Retirement Fund of 1950*, 171 U.S. App. D.C. 1, 17, 517 F.2d 1275, 1291 (1975, *en banc*) (invalidation of contingency fee agreements solicited after entry of judgment for liability).

fee in such circumstances is the "lodestar" method. (*Id.* at 16-19.)

During the pendency of the appeal, the court of appeals adopted Rule XIII of the District of Columbia Bar Rules (set forth in the appendix hereto), providing that an attorney "subject to the disciplinary jurisdiction of [the District of Columbia Court of Appeals] shall be deemed to have agreed to arbitrate disputes over fees for legal services . . . when such arbitration is requested by a present or former client. . . . "

REASONS THE PETITION SHOULD NOT BE GRANTED

The petition should not be granted because neither of the "questions presented" by the petition is based on the record below and because the actual decisions of the courts below are neither contested by the petition nor contrary to established jurisprudence.

I. The Questions Posed By The Petition Are Not Presented By The Record

The two "questions presented," as posed by the petition, have the same factual predicate: that there was a triable issue regarding the "existence of a fee agreement and its terms." That predicate, were it correct, would suggest that the courts below violated a broad reading of *Simler v. Conner*, 372 U.S. 221 (1963) (factual dispute as to existence and validity of a fee agreement is a legal issue) if not its precise holding (client entitled to trial by jury on

client's claim that fee agreement was procured by duress).

The predicate, however, is false. Mr. Ginberg filed his complaint not upon a fee agreement but for the reasonable value of services provided without a fee agreement. In other words, under District of Columbia law, Mr. Ginberg sued for quantum meruit recovery. *Chase v. Gilbert, supra.* He confirmed this expressly in pretrial discovery motions, and he stipulated to a limited number of issues to be tried. None of those issues even suggested the question of the "existence of a fee agreement and its terms." Rather, the only issues were what is a "reasonable fee" and what criteria would be used to measure it.

Not surprisingly, the trial court held that no jury would "have had the option to find any sort of contingency or value-based fee" (Pet. App. 8), and the court of appeals read the record as presenting *only* the issue of quantum meruit recovery where there was no fee agreement. (*Id.* at 6.)

Certiorari is not warranted where the only "questions presented" would be presented only by recasting the record to reflect decisions which neither of the courts below either made or thought they were making. *See Duncan v. Tennessee,* 405 U.S. 127 (1972) (dismissal of writ where, after briefing and oral argument, it appeared that state court decision was dependent upon non-constitutional interpretations of state law). Indeed, the court of appeals specifically held that, *had* there been a genuine issue of the "existence of a fee agreement and its terms," then that issue *would have been* triable to a jury. (Pet. App. 15-16.) Its decision was only that where, "as here, there is

no agreement concerning how the amount of fees is to be calculated," the trial court determines the amount of the fee. (*Id.* at 16, emphasis added.)

Mr. Ginberg does not challenge the ruling that quantum meruit calculations of attorneys' fees are a function of the trial court. Rather, he asserts only that the trial court and the court of appeals should have viewed the record before it as something other than quantum meruit, notwithstanding his pleadings, motions, pretrial stipulations, and trial positions.

The presumption against granting certiorari where the asserted error "consists of erroneous factual findings or the misapplication of a properly stated rule of law" (SUP. CT. R. 10) is doubly applicable here. First, the Court would not even reach the asserted error unless it first found that the trial court and court of appeals made erroneous findings regarding the state of the record before them. Second, the asserted error it would then reach would still be but a "misapplication of a properly stated rule of law" to an assertedly misperceived record.

If the Court were to review the record in this case and determine that, indeed, Mr. Ginberg had commenced, pretried, tried and argued his case below other than on a theory of quantum meruit, the "questions presented" by Mr. Ginberg would still not be presented to this Court. Rather, the Court would also have to assume that the court of appeals would have (a) *reached* the constitutional issues which (under that reading of the record) directly implicated *Simler v. Conner* rather than deciding the case

(for example) on the basis of waiver[5] or harmless error[6] or (because of the mandatory fee-arbitration rule) mootness and (b) *decided* the constitutional issue in a manner which that court expressly said it would not do. Neither assumption is warranted, nor does the record in this case warrant a stretch to grasp a constitutional issue not decided below.

Finally, were this Court to grant review of issues not actually decided below, the issues then before the court would include not only whether those issues are actually presented by the record (Respondent's Question 2) but, as well, whether Mr. Ginberg preserved those issues (Question 1) or would be harmed by any error in the decisions below (Question 3).

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[5] *See, e.g., Sewell v. Jefferson County Fiscal Court*, 963 F.2d 461, 464-66 (6th Cir. 1988) (plaintiff held to have waived jury demand by failing to make a timely objection to an order setting the case for bench trial).

[6] The courts below have already held that the award to Mr. Ginberg was the highest award that could have been made upon the evidence at trial. *See, e.g., In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982) (application of harmless error rule to jury trial demand).

II. The Decision Below Presents No Conflict With The Decisions Of This Court, Of A United States Court Of Appeals, Or Of Another State Court Of Last Resort.

The decision actually rendered by the District of Columbia Court of Appeals is not in conflict with any decision of this Court, of a United States court of appeals, or of any state court of last resort.

The decision of the court of appeals is expressly limited to those situations in which one of its lawyers, regulated by the District of Columbia Bar (an arm of that court), has violated a rule of professional responsibility by failing to make clear to his client, at the outset of the representation, the basis of the fee to be charged. It is limited to those situations in which, rather than a dispute about whether there is a fee agreement or which of several fee agreements might control, the record is abundantly clear that there was no agreement at all except the agreement implied by law to pay a "reasonable fee" for services rendered.

As the court of appeals noted, the question presented was

> whether an attorney who has no agreement with his client concerning the amount of the fee to be paid, who sues the client to recover fees under a quantum meruit theory, is entitled to a jury trial. [Pet. App. 10.]

These circumstances were express limitations upon the court's holding:

> We hold that where it is undisputed that the client owes the attorney some fee for his legal

> representation, but there is no agreement concerning how the amount will be determined and the attorney has not informed the client of the basis of his fee, the trial court, not the jury, determines the amount of fee to be paid. [*Id.*]

Mr. Ginberg asserts that this holding is contrary to the holding of this Court in *Simler v. Conner*, but the court of appeals accurately distinguished the holding in that case from the decision it made in the instant case. As the court of appeals noted, the question in *Simler v. Conner* was which of two competing fee agreements would be enforced, the contingency-fee agreement obtained by the lawyer under what the client claimed was duress or the original fee agreement between the lawyer and the client. Here, to the contrary, neither Mr. Ginberg nor Dr. Tauber ever claimed that there was any fee agreement at all. Their dispute was not about which of various competing versions of the facts was true but, rather, which of two competing versions of the law ought to be applied to the fact that there was no agreement.

Dr. Tauber contended for a ruling that the "lodestar" formula ought to be applied to determine the "reasonable fee" due to Mr. Ginberg, and Mr. Ginberg contended for the application of the more amorphous standards of Rule 1.5(a) of the District of Columbia Rules of Professional Conduct. Both the trial court and the court of appeals decided that question in favor of the "lodestar" approach – just as this Court has, in analogous situations, held the "lodestar" approach applicable to the determination of a "reasonable fee." *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984).

Mr. Ginberg does not challenge the "lodestar" approach *per se*. Nor has he ever argued that the trial court erred in its determination that the "lodestar" award was the highest "lodestar" award that any jury could have made based upon the evidence in the case. Rather, the real gist of Mr. Ginberg's petition is that the courts below ought to have let the jury decide what rule of decision should be applied to the case – that the court ought to have let the jury decide whether to apply the "lodestar" method or the criteria of Rule 1.5 in a case in which the lawyer has failed in his ethical obligation to make the basis of his fee clear from the outset of the representation.

The decision about which *standards* ought to apply to a given factual situation is a question of law, not a question of fact. That, plainly, is the prerogative of the courts, not a jury.[7]

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[7] As a matter of policy, a lawyer who seeks a result-based fee at the conclusion of the representation, without having obtained the agreement of his client to a result-based fee at the beginning of the representation, poses special problems for the administration of justice. An unscrupulous attorney might, for example, deliberately not disclose an intended basis for calculation of his fee until the end of his representation so as to formulate the calculation method to fit the result achieved – a result-based method for success, an hourly-rate-based method for a less favorable outcome. For that very reason, the courts of the District of Columbia have always held that fee contracts entered into long after the attorney-client relationship has commenced are subject to the "close scrutiny of the court," are "attended by a presumption of invalidity and overreaching," and result in a view of the client as, in essence, a ward of the court. *Spilker v. Hankin, supra; Pete v. United Mine Workers of Am. Welfare & Retirement Fund of 1950, supra.* This close scrutiny by

Either expressly or by implication, every court which has looked at the issue has held that the choice of method for determining a "reasonable fee" is either a matter of law or a matter for the exercise of discretion by the trial court – *not* a matter to be decided by the trier of fact and reviewed only if clearly erroneous. This Court did so implicitly in adopting the "lodestar" standard for fee-shifting cases. The United States Court of Appeals for the District of Columbia Circuit did so implicitly when it adopted the "lodestar" method in fee-shifting cases and the percentage-of-recovery method in common fund cases. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980, *en banc*) (lodestar); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993) (percentage of recovery). The Third Circuit Court of Appeals did so explicitly in *Student Public Interest Research Group v. AT&T Bell Laboratories*, 842 F.2d 1436, 1442 & n.3 (3rd Cir. 1988). And Mr. Ginberg has not suggested (either in his petition or in any of the proceedings below) that any court has ever held (or even intimated) otherwise.

Thus, even the decisions actually made by the court of appeals, which Mr. Ginberg challenges only obliquely (if at all), present no issue worthy of review by this Court.

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the courts has its genesis in the "inherent power [of the courts] over members of the legal profession." Preamble, District of Columbia Bar Rules.

CONCLUSION

For each of the foregoing reasons, Respondent requests that the petition be denied.

Respectfully submitted,

WILLIAM DANIEL SULLIVAN, Esquire
COLLIER, SHANNON, RILL & SCOTT, PLLC
3050 K Street, N.W., Suite 400
Washington, D.C. 20007
(202) 342-8558

NEAL GOLDFARB
INGERSOLL AND BLOCH
1401 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-9699

Counsel for Laszlo N. Tauber

APPENDIX

Rule XIII. Arbitration.

(a) An attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the attorney were engaged, or if a substantial portion of the services were performed by the attorney in the District of Columbia, or if the services included representation before a District of Columbia court or a District of Columbia government agency.

(b) The arbitration provided under this rule shall be final and binding on the parties according to applicable law, and shall be enforceable in the Superior Court and in any other court having jurisdiction. Unless the attorney and client agree otherwise, the arbitration shall be before the Attorney-Client Arbitration Board of the District of Columbia Bar, and shall be pursuant to such reasonable rules and regulations (including those relating to fees for arbitration services) as may be promulgated from time to time by the District of Columbia Bar and the Attorney-Client Arbitration Board. (Added, Nov. 10, 1994, effective Jan. 1, 1995.)